STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 20, 2006
v	No. 260157 Wayne Circuit Court
ROBERT LEE KING, Defendant-Appellant.	LC No. 04-005723-01

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for felonious assault and possession of a firearm during the commission of a felony. We affirm.

I. Basic Facts and Procedure

Defendant was charged with first-degree home invasion, MCL 750.110a(2), two counts of assaulting a police officer, MCL 750.81d(2), felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, he was convicted of felonious assault and felony-firearm. He was sentenced as a habitual offender, second offense, MCL 769.10, to consecutive prison terms of 28 months to six years for the felonious assault conviction and two years for the felony-firearm conviction.

II. Analysis

Defendant contends on appeal that there was insufficient evidence to sustain his convictions. Defendant also argues that the prosecutor engaged in misconduct by failing to produce a res gestae witness and that the trial court erred in finding that the prosecutor was not obligated to call the res gestae witness in question. Defendant argues that his counsel did not provide effective assistance of counsel when he failed to challenge the defendant's sentencing enhancement.

A. Sufficiency of the Evidence

Defendant argues that the prosecution failed to present sufficient evidence to sustain his conviction for felonious assault. "In reviewing the sufficiency of the evidence in a criminal case, [this Court] must view the evidence in a light most favorable to the prosecution and determine

whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), *amended by* 441 Mich 1201; 489 NW2d 748 (1992). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

The victim testified that defendant called her on the telephone and said that he was going to kill her. The victim also testified that defendant told her that her mother would find her body in the backyard. Immediately thereafter, defendant came to the victim's home with a firearm and kicked in her door. The victim testified that defendant's actions scared her. The victim's stepfather also testified that defendant tried to kick the door in. The stepfather testified that defendant did not point the gun at him, but he did observe defendant with the firearm. Defendant also took the stand during the trial. Defendant testified that while he was upset with the victim, he only wanted to talk to her. Defendant further testified that he tried to get into the apartment to get away from the police. The jury had an opportunity to draw inferences from the evidence presented at trial. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Further, it is the jury's role, and not the role of this Court, to decide the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004), citing *People v Wolfe*, *supra* at 514-515.

In viewing the evidence in the light most favorable to the prosecution, the jury could reasonably conclude that there was sufficient evidence to convict defendant of felonious assault beyond a reasonable doubt.

B. Res Gestae Witness

Defendant argues that the prosecutor was required to call a res gestae witness, Ms. Crawford. Further, defendant argues that the trial court erred in concluding otherwise. However, defendant did not object to the trial court's ruling that the prosecutor need not produce the witness and did not assert that prosecutorial misconduct occurred. Thus, the issue is unpreserved and reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The defendant must show that 1) an error occurred, 2) the error was plain, and 3) the error affected substantial rights, generally requiring a showing of prejudice that the error affected the outcome of the court proceedings. *Id.*

Defendant argues that the prosecution was required to call Ms. Crawford as a res gestae witness. A prosecutor is required to provide a list of all witnesses who might be called at trial and all res gestae witnesses. MCL 767.40a(1). Defendant argues that Ms. Crawford was a res gestae witness based on his affidavit. In his affidavit, defendant states that Ms. Crawford told him she saw "the incidents." While a criminal defendant has a fundamental right to compulsory process, this right is not absolute. *People v McFall*, 224 Mich App 403, 408; 569 NW2d 828 (1997). Defendant must show that the witness's testimony would be both material and favorable to the defense. *Id.* Defendant's affidavit does not meet those requirements. The prosecutor did include Ms. Crawford on the witness list. The designation "and/or" was placed by her name on the witness list. The designation "X" was also placed by her name, indicating that the prosecution intended to call her at trial. The court, faced with two designations, made the

determination that the prosecutor was not under any obligation to call Ms. Crawford as a witness, because an "or" was written next to the witness' name. This finding of fact can only be set aside if it is clearly erroneous. MCR 2.613. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Peterson v Dep't of Transp.*, 154 Mich App 790, 795; 399 NW2d 414 (1987), citing *Tuttle v. Dep't of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976). At trial, both the victim and her stepfather testified regarding the alleged incident. The victim and her stepfather were res gestae witnesses: they were at the scene and gave a first-hand account of what occurred. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). It is notable that one exception to the general rule requiring production of res gestae witnesses recognized by our Supreme Court and this Court occurs when the testimony of the missing witness would be merely cumulative. See *People v. Bennett*, 46 Mich App 598, 620; 208 NW2d 624 (1973), *rev'd on other grounds* 393 Mich 445; 224 NW2d 840 (1975). Thus, the court did not err in finding that the prosecution was under no obligation to call Ms. Crawford as a res gestae witness.

The defendant argues that the prosecutor was required to use due diligence to locate Ms. Crawford. Under MCL 767.40a(5), upon request by the defendant or defense counsel, the prosecutor shall provide reasonable assistance to locate a witness. This request by defendant or defense counsel must be made in writing at least 10 days before trial or at the direction of the court. *Id.* Defendant never requested the prosecutor's assistance, and absent any request from the court, the prosecutor was under no obligation to assist defendant in finding Ms. Crawford.

Defendant argues that the trial court erred in refusing to give defendant sufficient time to find Ms. Crawford. Defendant did ask for an opportunity to call the witness, and the trial court allowed him until the following morning to find Ms. Crawford. There is no indication that the defendant requested a continuance after he failed to find the witness. The court did not err when there was no request for a continuance. *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995).

We conclude that the trial court did not commit plain error in finding that the prosecutor was under no obligation to call Ms. Crawford. Further, the trial court did not commit plain error in allowing defendant a limited amount of time to find Ms. Crawford.

C. Ineffective Assistance of Counsel

Defendant brings two claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, a defendant must "show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant faces a strong presumption that counsel's conduct was proper. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The burden to prove ineffective assistance of counsel rests solely with the defendant. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000), citing *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998).

Defendant argues that his attorney failed to challenge the sentencing enhancement based on the prosecution's failure to serve a notice of intent. A prosecutor must file a written notice of intent to seek to enhance a defendant's sentence within 21 days after the defendant's arraignment. MCL 769.13(1). The prosecutor must also indicate the prior conviction that will

be relied upon for sentence enhancement. MCL 769.13(2). Defendant was arraigned on May 21, 2004. The prosecutor included the sentencing enhancement notice in the defendant's information:

> HABITUAL OFFENDER- SECOND OFFENSE NOTICE
>
> Take notice that the defendant was previously convicted of a felony or an attempt to commit a felony in that on or about May 15, 1990, he or she was convicted of the offense of CRIMINAL SEXUAL CONDUCT-3RD in violation of 750.520D1B in the RECORDER'S Court for CITY OF DETROIT, State of MICHIGAN.

The prosecutor is required to file the notice with the court and serve notice upon the defendant and his or her attorney. MCL 769.13(2). Failure to follow the requirements of MCL 769.13 violates a defendant's right to due process under the Michigan and U.S. Constitutions. *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999), citing Const 1963, art 1, § 17; US Const, Am V, Am XIV. In *Walker*, the defendant argued that his due process rights were violated by the prosecutor's failure to file a proof of service. *Walker, supra*, at 314. This Court noted that no authority existed to support the defendant's proposition, and found that any error was harmless beyond a reasonable doubt. *Id.* citing *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998).

Defendant here does not assert that he never received a copy of the information. And there is no dispute in the record that defendant was on notice regarding his habitual offender status by the time of his preliminary examination, June 1, 2004, which was within the 21 days required by statute. The purpose of MCL 769.13 is to ensure that a defendant has notice at an early stage in the proceedings that he could be sentenced as a habitual offender. *People v Morales*, 240 Mich App 571, 582; 618 NW2d 10 (2000). Defendant was not prejudiced in his ability to respond to the habitual offender charge. *Walker, supra* at 315. Therefore, because defendant's argument regarding notice of his habitual offender status is without merit, a claim of ineffective assistance of counsel based on counsel's failure to challenge the sentencing enhancement fails. See *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Defendant also argues that his counsel failed to challenge the sentencing enhancement based on a prior conviction in which he was not afforded assistance of counsel. According to defendant's pre-sentence investigation report, the juvenile court waived jurisdiction, and defendant, then sixteen years old, was tried as an adult. Defendant contends that because his right to counsel was violated at the waiver hearing, the subsequent hearing was invalid and therefore the conviction should not be used to enhance his sentence.

The United States Supreme Court has held that juveniles have a Sixth Amendment right to counsel in all adjudicatory proceedings. *Kent v United States*, 383 U.S. 541, 557 (1966). Our Supreme Court has held that a defendant can collaterally attack the validity of a conviction used for sentencing enhancement when that conviction was obtained in violation of a defendant's right to counsel. *People v Carpenter*, 446 Mich 19, 29-30; 521 NW2d 195 (1994). Lack of counsel is a jurisdictional defect. *Id.* Our Supreme Court has established the types of proof needed to collaterally attack a prior conviction for lack of counsel: (1) a docket entry or transcript showing the absence of counsel; or (2) evidence that defendant requested such

information and the trial court failed to reply or refused to furnish the records in a reasonable time. *Carpenter*, *supra* at 31. Also, this Court has held that a notation on a pre-sentence investigation report indicating that a defendant was not represented by counsel constitutes sufficient proof. *People v Alexander* (*After Remand*), 207 Mich App 227, 230; 523 NW2d 653 (1994). However, mere silence on a report is not sufficient proof. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996).

Defendant has not established that he was denied counsel during a juvenile proceeding. The only evidence is a portion of the pre-sentence investigation report. That portion of the report shows no name next to the "attorney present" box. Defendant did not provide this Court with a copy of the transcript from the waiver hearing or documentation from the juvenile court to establish that he was not represented by counsel. Thus, the proofs offered do not affirmatively state that defendant was not represented by counsel. Therefore, defendant's claim of ineffective assistance of counsel based on counsel's failure to challenge the sentencing enhancement on the basis of his prior conviction fails. See *Lyles*, *supra* at 596.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio